Editor's note: Reconsideration denied by order dated April 9, 1980; Appealed -- aff'd, Civ.No. LV-80-370-RDF (D.Nev. July 13, 1983), aff'd No. 83-2349 (9th Cir. Oct. 28, 1985)

CHARLES HOUSE

MRS. LEONARD SKINNER

IBLA 79-190 Decided September 11, 1979

Appeal from decisions of the Nevada State Office, Bureau of Land Management dated January 9, 1979, declaring mining claims null and void ab initio and rejecting mineral patent applications N-11872, N-11873, and N-20317.

Affirmed.

1. Mining Claims: Lands Subject to -- Mining Claims: Location -- Multiple Mineral Development Act: Generally -- Multiple Use -- Oil and Gas Leases: Generally -- Segregation: Generally

   Prior to passage of the Multiple Mineral Development Act, 30 U.S.C. §§ 521-531 (1976), a prima facie valid mineral lease, or application therefor, though void and ineffectual to vest any rights to minerals subject to the mining laws in the lessee segregated the land from the operation of the mining laws and prevented the initiation of rights under the mining laws by another person until it had been set aside and removed from the records of the land office.

2. Mining Claims: Common Varieties of Minerals -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Patent

   Where a mining claimant attempts to establish his location of a mining claim containing common variety minerals by invoking

the terms of 30 U.S.C. § 38 (1976) and fails to complete the statutory period for holding and working his claim prior to July 23, 1955, BLM may properly hold such claim to be null and void.

APPEARANCES: James L. Buchanan II, Esq., Las Vegas, Nevada; Robert E. McCarthy, Esq., Hill Cassas de Lipkau and Erwin, Reno, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Charles House and Mrs. Leonard Skinner appeal from decisions of the Nevada State Office, Bureau of Land Management (BLM), dated January 9, 1979, declaring mining claims Airway Number One, Blender Number One, Blender Number Two, Blender Number Three, and Airway Number Thirteen null and void ab initio and rejecting mineral patent applications for these same claims. N-11872, N-11873, N-20317.

The records of Clark County, Nevada, show the following dates of location for the claims at issue:

Airway Number One May 24, 1951 NE 1/4 sec. 25, T. 19 S., R. 62 E.

Blender Numbers One, Two, & Three October 5, 1951 N 1/2, SE 1/4 sec. 8, T. 20 S., R. 64 E.

Airway Number Thirteen September 20, 1951 SW 1/4 sec. 12 T. 20 S., R. 62 E.

Each of the claims is a placer mining claim for a common variety of sand and gravel.

The records of the Nevada State Office, BLM, reveal that each of the claims at issue occupied land subject to the following oil and gas leases, or application therefor:

Airway Number One Nev. - 0777 Application filed December 27, 1949
Lease issued March 1, 1950

Blender Numbers One, Two, & Three Nev. - 01221 Application filed March 7, 1950
Lease issued May 1, 1950

Airway Number Thirteen Nev. - 06098 Application filed September 4, 1951
Lease issued October 1, 1951

BLM rejected each of the mineral patent applications on the grounds that lands embraced in oil and gas permits, leases, or allowable applications for such leases, issued under the Mineral Leasing Act of February 25, 1920, are not subject to location under the mining laws. Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957).

BLM's decision discussed three alternative means by which the invalidity of appellant's claims could have been cured:

1. Congress, through the Act of August 12, 1953, 30 U.S.C. § 501 (1970), and the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1970), provided for the concurrent exploitation of both locatable and leasable mineral resources on public lands by providing a means for validating mining claims located on lands embraced within oil and gas leases, permits, offers or applications. The procedure to invoke these Acts has been set forth in Meritt N. Barton, 6 IBLA 293 (1972):

> [I]n order to have validated any mining claim located subsequent to July 31, 1939, and prior to January 1, 1953, covering lands which at the time of location were included in a permit or lease, or which were known to be valuable for such minerals, the owner of the claim must have filed not later than 120 days subsequent to August 12, 1953, an amended notice of location, which notice must have specified that it was filed pursuant to the Act of August 12, 1953, and for the purpose of obtaining the benefits set forth in that Act. . . . (Footnote omitted)

Appellants did not take advantage of the above provisions, because they were allegedly unaware of the prior conflict with any oil and gas leases.

2. The records of the Nevada State Office, BLM, show that the oil and gas leases which had previously invalidated appellants' mining claims were cancelled on the following dates:

Nev. - 02163 (assignment out of Nev. - 0777)	March 1, 1955
Nev. - 01221	May 1, 1955
Nev. - 06098	September 30, 1954

By the terms of 30 U.S.C. § 525 (1976), appellants could have relocated their claims after the Act of August 13, 1954, which in effect opened the land to location under the mining laws. Since the claims were located for a common variety of sand and gravel, such relocation would have had to occur prior to the Act of July 23, 1955, 30 U.S.C. § 611 (1976), which removed common varieties of sand and gravel from location under the mining laws.

Appellants did not relocate during this period, because, as before, they were allegedly unaware of the invalidity of their claims.

3. Appellants' third alternative was to have perfected their mining claims according to the terms of Revised Statute 2332, codified at 30 U.S.C. § 38 (1976). Under section 38, a person who has held and worked a mining claim for a period of time equal to the statute of limitations for mining claims of the state where the claim is located is deemed to have made a location, provided that during the time of holding, the land was open to mining location. Gardner C. McFarland, 8 IBLA 56 (1972), Meritt N. Barton, supra. Nevada has a 2-year statute of limitations for mining claims. Nev. Rev. Stat. § 11.060.

In order to prevail under 30 U.S.C. § 38, appellants must show 2 years use and occupancy beginning August 13, 1954. By decision of this Board in United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974), the 2-year period of use and occupancy must be completed prior to July 23, 1955. BLM held that this interpretation prevented appellants from successfully invoking section 38, supra, because appellants could not allege 2 years use and occupancy beginning August 13, 1954, and completed on or before July 23, 1955.

[1] In their statement of reasons on appeal, appellants seek to examine various records from which BLM determined that the mining claims at issue occupied land subject to valid oil and gas leases or applications therefor on the date of location. The validity of the leases or applications therefor is not an issue in this case. In Duncan Miller, A-28059, 66 I.D. 388, 391 (1959), the Deputy Solicitor wrote:

> The Department has repeatedly held that an outstanding oil and gas lease, whether void or voidable, bars any filing for the leased land until the cancellation of the lease is noted on the tract books. Joyce A. Cabot et al., 63 I.D. 122 (1956); R. B. Whitaker et al., 63 I.D. 124 (1956); Allan A. Stramler, Jr., A-27949 (June 15, 1959).

This rule applies regardless of whether the mining claims were located after the conflicting lease or application therefor has been cancelled but before the notation on the tract books or where the mining claims are located prior to the cancellation or relinquishment of the outstanding lease. See Joyce A. Cabot, supra at 122.

In Hodges v. Colcord, 193 U.S. 192 (1904), the Supreme Court held that a prima facie valid entry, though void and ineffectual to vest any rights in the entryman, segregates the land from the public domain and prevents the initiation of rights by another person until it has been set aside and removed from the records of the land office. Joyce C. Cabot, supra at 123.

Appellants acknowledge that they have examined the Historical Index and serial pages for the claims at issue and find the various dates of application and lease issuance to be as stated supra. Given this action and the well established principle of law within the Department, it is difficult to see how appellants can be benefitted by a challenge to the prior oil and gas leases.

[2] As set forth above, this Board in United States v. Guzman, supra, interpreted 30 U.S.C. § 38 (1976), to require that the statutory period for holding and working a mining claim for a common variety mineral be completed prior to July 23, 1955, the effective date of 30 U.S.C. § 611 (1976). Because this interpretation prevents appellants from successfully invoking section 38, supra, appellants ask this Board to "modify" the principles set forth therein. This we decline to do, since there is no legal predicate therefor.

30 U.S.C. § 38 (1976) is a remedial provision designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording, and transfer. Cole v. Ralph, 252 U.S. 286, 305 (1920). Its terms clearly require that appellants hold and work their claims "for a period equal to the statute of limitations for mining claims of the State or Territory where the same may be situated." In this case, the period is 2 years long. At the time of passage of the Act of July 23, 1955, supra, appellants had not completed this 2-year period. Hence appellants can not be said to have located the subject claims as of the date of passage of this Act.

The consequences of a failure to locate prior to passage is set forth in 30 U.S.C. § 611:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. . . .

In order for a mining claim on public lands to be valid, it is necessary that the discovered mineral deposits be "valuable." Barrows v. Hickel, 447 F. 2d 80, 82 (1971). After July 23, 1955, the sites worked by appellants contained no valuable locatable mineral deposits within the meaning of the mining laws. BLM properly concluded that appellants' mining claims were null and void. Having so concluded, it was proper for BLM to reject appellants' mineral patent applications. 30 U.S.C. § 29 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

James L. Burski
Administrative Judge